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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 VHT, INC.,

11 Plaintiff,

12 v.

13 ZILLOW GROUP, INC., et al.,

14 Defendants.

CASE NO. C15-1096JLR

ORDER ON THE PARTIES'
CROSS-MOTIONS

15
16 **I. INTRODUCTION**

17 Before the court are: (1) Defendant Zillow Group, Inc., and Zillow, Inc.'s
18 (collectively, "Zillow" or "Defendants") motion for judgment on the pleadings, or in the
19 alternative, partial summary judgment (Zillow Mot. (Dkt. # 339)); and (2) Plaintiff VHT,
20 Inc.'s ("VHT") cross-motion for partial summary judgment (VHT Mot. (Dkt. # 343)).¹

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22 ¹ VHT's cross-motion for partial summary judgment includes VHT's response to
Zillow's motion for partial summary judgment. For simplicity's sake, the court cites to the
parties' motions respectively as "Zillow Mot." and "VHT Mot."

Both motions are opposed. (*See* VHT Mot.; Zillow Reply (Dkt. # 345).)² The court has considered the motions, the parties’ submissions in support of and in opposition to the motions, the relevant portions of the record, and the applicable law. Being fully advised,³ the court construes Zillow’s motion for judgment on the pleadings as a portion of Zillow’s motion for partial summary judgment, DENIES Zillow’s motion for partial summary judgment, and GRANTS VHT’s motion for partial summary judgment.

II. BACKGROUND

A. Factual Background

1. VHT’s and Zillow’s Businesses

This action arises from Zillow’s use of VHT’s copyrighted real estate photographs. (*See* PTO (Dkt. # 244) at 2-3; Ex. 600 (Dkt. # 272) ¶ 2.) VHT is a real estate photography company that commissions photographs from professional photographers. (10/25/16 Hensley Decl. (Dkt. # 140) ¶ 2, Ex. A (“Balduf Dep.”) at

² Zillow filed a combined response to VHT’s cross-motion for partial summary judgment and reply in support of Zillow’s motion for partial summary judgment. For simplicity’s sake, the court cites to this filing as “Zillow Reply.”

³ VHT and Zillow both request oral argument. (*See* Zillow Mot. at 1; VHT Mot. at 1.) Oral argument is not necessary where the non-moving party suffers no prejudice. *See Houston v. Bryan*, 725 F.2d 516, 517-18 (9th Cir. 1984); *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (holding that no oral argument was warranted where “[b]oth parties provided the district court with complete memoranda of the law and evidence in support of their respective positions,” and “[t]he only prejudice [the defendants] contend they suffered was the district court’s adverse ruling on the motion.”). “When a party has an adequate opportunity to provide the trial court with evidence and a memorandum of law, there is no prejudice [in refusing to grant oral argument].” *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (quoting *Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991)) (alterations in *Partridge*). Here, the issues have been thoroughly briefed by the parties, and oral argument would not be of assistance to the court. *See* Local Rules W.D. Wash. LCR 7(b)(4). Accordingly, the court DENIES the parties’ requests for oral argument.

20:13-15; *id.* ¶ 3, Ex. B (“Bosch Dep.”) at 39:6-9, 51:9-52:8; *id.* ¶ 15, Ex. N (“VHT Contractor Agmt.”) at VHT005555-58.) VHT creates and curates photographs of residential real estate properties listed for sale and the licenses those photographs to real estate brokers and agents. (PTO at 5.) VHT’s clients, which include real estate brokerages and real estate agents, use VHT’s photographs to market their properties and listings. (Balduf Dep. at 20:18-21:2.) When a broker or agent requests that VHT obtain and license photos of a residential real estate property, VHT dispatches one of the photographers in the VHT Photographer Network to shoot photographs of that property. (*Id.*) VHT maintains its photographs in a database and licenses the photographs in its database either collectively or individually to third parties. (TAC (Dkt. # 123) ¶ 23.) A typical shoot results in approximately 16 photographs of a property. (*Id.* ¶ 27.) Customers pay on either a per-property or per-photograph basis. (*Id.*)

Zillow operates Zillow.com, a large real estate website. (10/25/16 Kutner Decl. (Dkt. # 130) ¶ 2.) Since February 2013, Zillow’s website has included a content area called Zillow “Digs,” which is themed around the topic of home design and renovation. (*Id.*; *see generally* TAC.) Digs “includes a searchable set of images of home interiors classified by room type and tagged with information about the room contents, as well as ‘boards’ where users can save and share images they are interested in.” (10/25/16 Kutner Decl. ¶ 4.)

Zillow obtains the photographs that it uses on Digs from two main sources: (1) public records; and (2) real estate listings received from agents, brokers, and Multiple Listing Services (“MLSs”). (*Id.* ¶ 5.) Zillow contracts with each agent, broker, and MLS

1 to clarify the terms under which Zillow may use the contents of each listing. (*Id.*) Some
 2 of those contracts restrict how Zillow may use the photos after a property is sold; Zillow
 3 calls these contracts “deciduous.” (*Id.* ¶ 6.) However, the majority of the contracts are
 4 “evergreen,” meaning they do not restrict Zillow’s ability to use data or images after a
 5 property sells. (*Id.*)

6 2. Zillow’s Use of VHT’s Images

7 In this lawsuit, VHT alleges that Zillow infringed upon 28,125 of VHT’s
 8 photographs (“the VHT Photos”). (*See* PTO at 2-3; Ex. 600 ¶¶ 6, 9-10; Summ. Image SS
 9 (Dkt. # 256-1); Final JIs (Dkt. # 275) at 20.) Zillow used 28,124—all but one—of the
 10 VHT Photos in conjunction with the Digs section of Zillow’s website. (*See* Summ.
 11 Image SS; Ex. 600 ¶ 11; Ex. 512 at Column N.) Zillow also used one of those 28,124
 12 VHT Photos in an email. (1/27/17 Trial Tr. (Dkt. # 291) at 98-100, 112; Ex. 293; Ex. 512
 13 at Row 17,744, Column AV.)⁴ Zillow used the final VHT Photo exclusively in a blog
 14 post. (1/27/17 Trial Tr. at 100, 112; Ex. 243; Ex. 512 at Row 28,127, Column AV.)⁵

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19 ⁴ All citations beginning with “Ex.” without reference to a declaration or other filing refer
 20 to trial exhibits.

21 ⁵ Because of the voluminous number of VHT Photos at issue, the parties tried the case by
 22 stipulating to the accuracy of an electronic spreadsheet that provided pertinent details regarding
 all 28,125 VHT Photos. (*See* Ex. 600 ¶ 12; Ex. 512; *see also* Ex. 600 ¶ 13; Ex. 513 (displaying
 each VHT Photo from VHT’s copyright registrations and the mirror image from Digs).)

1 **B. Procedural Background**

2 1. VHT's Copyright Applications and Registrations

3 VHT maintains its images in a database. (*See* Rummage Decl. (Dkt. # 344) ¶ 2,
4 Ex. A.) On a quarterly basis, VHT registers its images with the United States Copyright
5 Office (the "Copyright Office") through a group registration procedure that allows large
6 volumes of photographs to be registered using a single form. (*See id.* Exs. 1-9.)

7 VHT filed this lawsuit on July 8, 2015. (*See id.*) At the time VHT filed its initial
8 complaint, it had filed applications to register photographs in its database created from
9 the beginning of 2010 through the end of the first quarter of 2015. (*Id.*) Attached to
10 VHT's initial complaint are copies of nine applications VHT has submitted as of the time
11 of its initial complaint. (*See id.* ¶ 27, Exs. 1-9.)

12 Zillow answered VHT's initial complaint on August 27, 2015. (*See* Answer (Dkt.
13 # 22).) On September 22, 2015, the Copyright Office rejected eight of VHT's ten
14 pending applications for failure to establish the element of "compilation authorship"
15 required for the form of registration that VHT had chosen. (*See* Crosby Decl. (Dkt.
16 # 340) ¶ 3, Ex. 2 at TX405.) On that basis, the Copyright Office refused to register
17 VHT's images and closed its files. (*Id.*) VHT asked the Copyright Office to reconsider
18 its decision in a December 14, 2015, letter. (*See* Crosby Decl. ¶ 2, Ex. 1 at TX 244.005.)
19 On June 30, 2016, the Copyright Office granted VHT's request to reconsider its
20 determination. (*See* Crosby Decl. ¶ 4, Ex. 3 at TX 365.002.)

21 VHT amended its complaint three times. (*See* FAC (Dkt. # 53); SAC (Dkt.
22 # 105); TAC.) By mid-2016, the Copyright Office had reconsidered and approved 11 of

1 VHT's registrations. (*See* Rummage Decl. ¶ 2, Ex. A.) VHT filed its third amended
2 complaint on October 24, 2016, and attached to it the relevant Copyright Office
3 registrations. (*See* TAC ¶ 30, Ex. 15.) Each registration states that it is a "group
4 registration for VHT, Inc. database" along with corresponding dates. (*See id.*) Each
5 registration further states: "Basis of registration: compilation of photographs added to
6 revised database." (*See id.*) Listed as the "derivative work or compilation" is
7 "[p]reviously published photographs" and under "material added to this work" is
8 "[c]ompilation of photographs in unpublished database and photographs contained in the
9 database." (*Id.*) The effective date for five of the registrations was July 8, 2015; the rest
10 have an effective date of January 27, 2016. (*See id.*)

11 2. Pretrial Motions

12 On October 25, 2016, Zillow moved for summary judgment on all five of VHT's
13 copyright infringement claims. (*See* Zillow MPSJ (Dkt. # 129).) VHT cross-moved for
14 partial summary judgment as to liability on its copyright infringement claims and sought
15 summary judgment on Zillow's four counterclaims. (*See* VHT MPSJ (Dkt. ## 137
16 (redacted); 141 (sealed)).) The court granted in part and denied in part the parties'
17 motions. (*See* MSJ Order (Dkt. # 211) at 50.) The court granted VHT summary
18 judgment on Zillow's counterclaims, granted Zillow summary judgment on VHT's
19 infringement claims with respect to Zillow's home details pages on its listing website,
20 denied Zillow summary judgment on VHT's infringement claims with respect to Zillow's
21 use of Digs, and made several other rulings. (*See id.* at 32, 38-41.)
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1 3. The Compilation Issue

2 At trial, Zillow asked the court to determine whether 17 U.S.C. § 504(c)(1) limits
3 VHT to a single award of statutory damages for all infringements of any number of
4 images that VHT registered under an express claim of compilation in a single database.
5 (See Prop. PTO (Dkt. # 218) at 6.) Under 17 U.S.C. § 504(c)(1), a party may elect to
6 recover statutory damages instead of actual damages for copyright infringement. 17
7 U.S.C. § 504(c)(1). A party that does so is entitled to a statutory damages award of
8 between \$750.00 and \$30,000.00 “with respect to any one work.” *Id.* For the purposes
9 of statutory damages, “all the parts of a compilation or derivative work constitute one
10 work.” *Id.* In other words, if VHT’s images constitute a single “compilation,” then the
11 images by definition constitute a single “work,” and VHT would be entitled on a single
12 award of statutory damages for Zillow’s infringement of any or all of the images. On the
13 other hand, if each image is a separate work, VHT would be entitled to statutory damages
14 on a per-image basis.

15 The court initially declined to rule on the question of whether VHT would be
16 entitled to statutory damages on a per-image basis. (See 2/7/17 Trial Tr. (Dkt. # 294) at
17 12.) Prior to issuing final jury instructions, the court ruled that VHT was entitled to a
18 separate award of statutory damages for each image that has independent economic
19 value. (See *id.* at 13.) The court relied on *Columbia Pictures Television v. Krypton*
20 *Broad. of Birmingham, Inc.*, 106 F.3d 284, 292 (9th Cir. 1997) (“*Columbia Pictures*
21 *I*”), *rev’d sub nom. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)).
22 (See 2/7/17 Trial Tr. at 13.) Based on *Columbia Pictures I* and its progeny, the court

determined that “the proper test to apply in analyzing whether each component is a separate work for purposes of statutory damages is whether each component has independent economic value.” (*See id.* at 16.) The court placed the question of independent economic value before the jury. (*See* Jury Instructions (Dkt. # 275) at 31 (“Congress established statutory damages for each separate work infringed. Each VHT Photo that has independent economic value constitutes a separate work.”); Verdict Form (Dkt. # 281) at 5.)

4. Trial and Verdict

Following trial, the jury found that Zillow directly infringed 28,125 of VHT’s images. (Verdict Form at 1-2.) The jury also found that Zillow contributorily and vicariously infringed VHT’s copyrights, but because the verdict form instructed the jury not to double-count Zillow’s infringements, it is not clear how many copyrights the jury found Zillow indirectly infringed. (*Id.* at 2.) After rejecting Zillow’s affirmative defenses of license and fair use (*id.* at 3), the jury awarded actual damages of \$2.84 per photograph, or \$79,875.00 (*id.* at 4).

The jury also awarded \$8,247,300.00 in statutory damages. (*Id.* at 6.) The jury found that 19,312 images were eligible for statutory damages under 17 U.S.C. § 594(c)(1), and that each of those 19,132 images had independent economic value. (*Id.* at 5:6-17.) Because some of the statutory and actual damages were duplicative (*see id.* at 4:15-6:9), VHT elected to receive statutory damages for the 19,312 VHT Photos that were eligible for statutory damages (*see* Summ. Image SS at 1; Ex. 512 at Column AR) and actual damages for the remaining 8,813 VHT Photos (*see* Summ. Image SS at 1; Ex.

512 at Column AR; Dam. Election (Dkt. # 286) at 1). Pursuant to the jury's verdict and VHT's damages election, the court entered judgment for VHT in the amount of \$8,272,328.92. (*See* Judgment (Dkt. # 296).)

5. Post-Trial Motions

After trial, Zillow filed a motion for judgment notwithstanding the verdict or for a new trial. (*See* JNOV Mot. (Dkt. # 301).) The court partially granted Zillow's motion, reversed in part the jury's verdict, reduced VHT's actual damages to \$3,467.64, and reduced VHT's statutory damages award to \$4,050,400.00. (*See* 6/20/17 Order (Dkt. # 2) at 46.) The court entered a final judgment on July 10, 2017. (*See* Final Judgment (Dkt. # 322).)

6. Appeal and Remand

The parties cross-appealed issues stemming from partial summary judgment, the jury verdict, and judgment notwithstanding the verdict. *See VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 730 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122, 205 (2019). The Ninth Circuit affirmed (1) the court's summary judgment in favor of Zillow on direct infringement of the Zillow's listing platform photos; (2) the court's judgment notwithstanding the verdict in favor of Zillow on 22,109 non-displayed photos and 2,093 displayed but not searchable photos; (3) the court's summary judgment in favor of VHT on 3,921 displayed, searchable Digs photos; and (4) the court's judgment notwithstanding the verdict in favor of Zillow on secondary liability, both contributory and vicarious, on the Digs photos. *Id.* at 750. The Ninth Circuit reversed the court's denial of judgment

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1 notwithstanding the verdict on the issue of willfulness and vacated the jury's finding on
2 willfulness. *See id.*

3 Finally, the Ninth Circuit remanded for consideration of the issue of whether
4 VHT's photos used on Digs were part of a compilation or were individual "works." *Id.* at
5 747-48, 750. The Ninth Circuit instructed that determining whether the images at issue
6 are part of a "compilation" is a "threshold damages question" and that "consideration of
7 the independent economic value factor does not answer the question whether something
8 is a compilation." *See id.* at 747.

9 7. The Fourth Estate Opinion

10 On March 4, 2019, 11 days before the Ninth Circuit issued its opinion in this case,
11 the United States Supreme Court decided *Fourth Estate Public Benefit Corp. v.*
12 *Wall-Street.com, LLC, et al.*, ---U.S.---, 139 S. Ct. 881 (2019). *Fourth Estate* addressed
13 the interpretation of 17 U.S.C. § 411(a), which states, in relevant part, that "no civil
14 action for infringement of the copyright in any United States work shall be instituted until
15 preregistration or registration of the copyright claim has been made." *See* 17 U.S.C.
16 § 411(a). In a unanimous opinion, the Supreme Court resolved a circuit split and held
17 that "'registration . . . has been made' within the meaning of 17 U.S.C. § 411(a) not when
18 an application for registration is filed, but when the Register has registered a copyright
19 after examining a properly filed application." *See id.* at 892. *Fourth Estate* overturned
20 the prior settled law in the Ninth Circuit, under which "receipt by the Copyright Office of
21 a complete application satisfies the registration requirement of § 411(a)." *See Cosmetic*
22 *Ideas, Inc. v. IAC/Interactive Corp.*, 606 F.3d 612, 621 (9th Cir. 2010), *overruled by*

1 *Fourth Estate*, 139 S. Ct. 881. Zillow’s motion for judgment on the pleadings at issue
 2 here is the first instance in which Zillow has raised a *Fourth-Estate*-based challenge to
 3 VHT’s claims. (See Zillow Reply at 10-13.)

4 8. Post-Remand Procedure

5 The parties filed a stipulated motion setting a briefing schedule for post-remand
 6 motions (see Briefing Mot. (Dkt. # 336)), which the court granted (see 11/27/19 Order
 7 (Dkt. # 338)). In accordance with that schedule, Zillow filed a motion for judgment on
 8 the pleadings based on *Fourth Estate*, or in the alternative, for partial summary judgment
 9 on the compilation issue. (See Zillow Mot.) VHT filed a combined opposition to
 10 Zillow’s motion and cross-motion for partial summary judgment on statutory damages.
 11 (See VHT Mot.) The court now considers the parties’ cross motions.

12 III. ANALYSIS

13 The court first sets forth the legal standards applicable to the parties’ motions.
 14 The court next addresses Zillow’s motion for judgment on the pleadings because it raises
 15 a potential jurisdictional defect. The court then turns to the parties’ cross-motions on the
 16 compilation issue.

17 A. Legal Standards

18 1. Summary Judgment

19 Summary judgment is appropriate if the evidence shows “that there is no genuine
 20 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 21 Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
 22 *Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the

1 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
2 factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact
3 finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,
4 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

5 The moving party bears the initial burden of showing there is no genuine dispute
6 of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at
7 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can
8 show the absence of such a dispute in two ways: (1) by producing evidence negating an
9 essential element of the nonmoving party’s case, or (2) by showing that the nonmoving
10 party lacks evidence of an essential element of its claim or defense. *Nissan Fire &*
11 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party
12 bears the ultimate burden of persuasion at trial, it must establish a *prima facie* showing in
13 support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d
14 1465, 1471 (9th Cir. 1994). That is, the moving party must present evidence that, if
15 uncontroverted at trial, would entitle it to prevail on that issue. *Id.* at 1473. If the moving
16 party meets its burden of production, the burden then shifts to the nonmoving party to
17 identify specific facts from which a fact finder could reasonably find in the nonmoving
18 party’s favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

19 The court is “required to view the facts and draw reasonable inferences in the light
20 most favorable to the [nonmoving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007)
21 (internal quotation marks and citation omitted). The court may not weigh evidence or
22 make credibility determinations in analyzing a motion for summary judgment because

those are “jury functions, not those of a judge.” *Anderson*, 477 U.S. at 255. However, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Scott*, 550 U.S. at 380 (internal quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

2. Judgment on the Pleadings

The standard for dismissing claims under Federal Rule of Civil Procedure 12(c) is “substantially identical” to the Rule 12(b)(6) standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *Chavez v. United States*, 683 F.3d 1102, 1008 (9th Cir. 2012) (internal quotation marks and citation omitted); *see also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (“Although *Iqbal* establishes the standard for deciding a Rule 12(b)(6) motion, we have said that Rule 12(c) is functionally identical to Rule 12(b)(6) and that the same standard of review applies to motions brought under either rule.”) (internal quotation marks and citation omitted). This is because, “under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.” *Chavez*, 683 F.3d at 1008 (internal quotation marks and citation omitted).

Rule 12(c) motions for judgment on the pleadings should be made “[a]fter the pleadings are closed—but early enough not to delay trial.” Fed. R. Civ. P. 12(c). Courts have discretion to accept extraneous matter and construe a motion for judgment on the pleadings as a motion for summary judgment. *See Sirisup v. It’s Thai, L.L.C.*, No.

CV-13-07246-DDP, 2015 WL 6181688, at *4 (C.D. Cal. Oct. 21, 2015), *aff'd sub nom.* 716 F. App'x 739 (9th Cir. 2018).

B. Zillow's Motion for Judgment on the Pleadings

Zillow moves for judgment on the pleadings on the ground that *Fourth Estate* requires dismissal of VHT's "remaining claims"⁶ for failure to meet 17 U.S.C. § 411(a)'s registration requirement. (*See* Zillow Mot. at 12 (citing *Fourth Estate*, 139 S. Ct. 881).)⁷ Zillow further argues that the Copyright Office's registration of VHT's images after VHT filed suit—and VHT's corresponding amendment of its complaint to include these registrations—does not remedy VHT's failure to satisfy § 411(a). (*See* Zillow Mot. at 13-14.)

VHT does not dispute that it obtained registrations for its images after filing suit. (*See generally* VHT Mot.; VHT Reply.) VHT opposes Zillow's motion for judgment on the pleadings on several grounds: (1) Zillow's motion is procedurally improper because a Rule 12(c) motion is by definition a pre-trial motion; (2) Zillow cannot seek judgment on the pleadings because there are no longer operative pleadings in this case, given that the pretrial order superseded the operative pleadings; (3) Even if Zillow's motion was

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⁶ Zillow is not explicit as to what claims it considers "remaining." (*See generally* Zillow Mot.) VHT's copyright infringement claims have already come before a jury and Zillow's liability on those claims has been argued further in post-trial motions and on appeal. *See supra* § II.B. Although not explicit, Zillow appears to seek dismissal of those same copyright infringement claims that have already been subject to judgment and appeal. Therefore, the court construes Zillow's motion as seeking dismissal of all of VHT's copyright infringement claims upon which Zillow was found liable in this case and dismissal of this case entirely.

⁷ The court cites the parties' briefing with the page numbers provided by the court's electronic filing system.

1 procedurally proper, the Copyright Office registered VHT's images prior to VHT's third
2 amended complaint, which attached those registrations; (4) VHT's right to recover on its
3 copyright claims is now the law of the case; (5) § 411(a)'s registration requirement is not
4 jurisdictional, but rather a "claim-processing rule"; and (6) Zillow waived any argument
5 that VHT filed this lawsuit prematurely. (*See* VHT Mot. at 19-29.) VHT further
6 contends that even if Zillow had preserved the issue, the proper remedy would not be
7 dismissal but rather to conform the pleadings to the evidence or permit an amendment
8 relating back to the original complaint. (*See id.* at 29.)

9 In reply, Zillow contends the court "cannot excuse" VHT's failure to comply with
10 § 411(a)'s registration requirement. (*See* Zillow Reply at 18.) Although not explicit,
11 Zillow's argument that the court "cannot excuse" § 411(a)'s registration requirement
12 implies a jurisdictional challenge. If the court lacks jurisdiction to adjudicate VHT's
13 claims, it must dismiss those claims regardless of the procedural posture of this case. *See*
14 *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011). Because
15 questions of jurisdiction are paramount, the court first analyzes the effect of *Fourth*
16 *Estate* and whether, as Zillow argues, *Fourth Estate* requires this court to dismiss VHT's
17 copyright infringement claims. The court then turns to the parties' remaining arguments,
18 including VHT's procedural challenge to Zillow's motion for judgment on the pleadings.

19 1. The Nature of Section 411(a)'s Registration Requirement

20 Section 411(a) provides that "no civil action for infringement of the copyright in
21 any United States work shall be instituted until . . . registration of the copyright claim has
22 been made in accordance with this title." 17 U.S.C. § 411(a). Prior to *Fourth Estate*, a

1 circuit split existed on the question of whether registration “has been made” in
2 accordance with § 411(a) as soon as the claimant delivers the required application, copies
3 of the work, and fee to the Copyright Office (the “application approach”); or only after
4 the Copyright Office reviews and registers the copyright (the “registration approach”).⁸
5 *Fourth Estate*, 139 S. Ct. at 886. Prior to *Fourth Estate*, the Ninth Circuit followed the
6 application approach. See *Cosmetic Ideas, Inc.*, 606 F.3d at 621 (holding that registration
7 “has been made” under § 411(a) when the copyright claimant’s “complete application”
8 for registration is received by the Copyright Office). In *Fourth Estate*, the Supreme
9 Court opted for the registration approach. See 139 S. Ct. at 892.

10 *Fourth Estate* describes the registration requirement as “akin to an administrative
11 exhaustion requirement that the owner must satisfy before suing to enforce ownership
12 rights.” *Id.* at 887.⁹ *Fourth Estate* further states that “[t]ime and again, then, Congress
13 has maintained registration as a prerequisite to suit.” *Id.* at 891. However, *Fourth Estate*
14 does not squarely address whether failure to meet the registration requirement mandates
15 dismissal in every case or whether a copyright claimant may amend its complaint to
16 include subsequently registered material. See *id.*; see also *Izmo, Inc. v. Roadster, Inc.*,
17 No. 18-CV-06092-NC, 2019 WL 2359228, at *2 (N.D. Cal. June 4, 2019).

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19 ⁸ Under either approach, once registered, copyright protection runs from the date of the
work’s creation. See, e.g., 17 U.S.C. § 106; *Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003).

20 ⁹ *Fourth Estate* also refers to the “limited circumstances” in which copyright owners may
21 file an infringement suit before undertaking registration. 139 S. Ct. at 888. Neither VHT nor
22 Zillow discuss these limited circumstances and neither argue that any of these limited
circumstances apply in this case. (See generally Zillow Mot; VHT Mot.; Zillow Reply; VHT
Reply.) Therefore, the court does not address them further.

1 The United States Supreme Court has held unmistakably that § 411(a)'s
2 registration requirement is non-jurisdictional and is instead a claim-processing
3 requirement. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) ("Section
4 411(a) thus imposes a type of precondition to suit that supports nonjurisdictional
5 treatment under our precedents.") In *Reed Elsevier, Inc.*, the Supreme Court held that
6 "Section 411(a)'s registration requirement is a precondition to filing a claim that does not
7 restrict a federal court's subject-matter jurisdiction." *Id.* at 157. "While perhaps clear in
8 theory, the distinction between jurisdictional conditions and claim-processing rules can
9 be confusing in practice." *Id.* at 1243. The *Reed Elsevier* Court applied the *Arbaugh* test,
10 which is used to distinguish between jurisdictional requirements and "claim-processing"
11 requirements. *Id.* at 161. The Court noted that "jurisdiction" refers to a court's
12 adjudicatory authority and speaks to "the courts' statutory or constitutional *power* to
13 adjudicate the case" rather than to "the rights or obligations of the parties." *Id.* at 160-61
14 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *Landgraf v. USI*
15 *Film Prods.*, 511 U.S. 244, 274 (1994)). Under the *Arbaugh* test:

16 If the Legislature clearly states that a threshold limitation on a statute's scope
17 shall count as jurisdictional, then courts and litigants will be duly instructed
18 and will not be left to wrestle with the issue. But when Congress does not
19 rank a statutory limitation on coverage as jurisdictional, courts should treat
20 the restriction as nonjurisdictional in character.

21 *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006).

22 Applying *Arbaugh*, the *Reed Elsevier* court concluded that § 411(a) does not
clearly state that the registration requirement is jurisdictional. *Reed Elsevier, Inc.*, 559
U.S. at 163. The Court further noted that it has treated as non-jurisdictional other

1 claim-processing requirements. *See id.* at 166 & n.6 (citing cases). Nevertheless, the
2 *Reed Elsevier* Court declined to address whether § 411(a)’s registration requirement is a
3 “mandatory precondition to suit that . . . district courts may or should enforce *sua sponte*
4 by dismissing copyright infringement claims involving unregistered works.” *See id.* at
5 171.

6 Whether the registration requirement is jurisdictional or non-jurisdictional is
7 significant in analyzing Zillow’s *Fourth Estate*-based arguments. If the registration
8 requirement is jurisdictional, Zillow cannot waive or forfeit objections to the
9 requirement. Additionally, the court would have an obligation to raise the defect *sua*
10 *sponte*, and a late-discovered defect might void VHT’s judgment on the merits. *See*
11 *Henderson ex rel. Henderson*, 562 U.S. at 434-35 (discussing the consequences of
12 whether a “procedural rule is ‘jurisdictional’”); *see also* Peter A. Devlin, Jurisdiction,
13 Exhaustion of Administrative Remedies, and Constitutional Claims, 93 N.Y.U. L. Rev.
14 1234, 1236 (2018). However, “a party may waive or forfeit the benefit of a
15 nonjurisdictional rule.” *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th
16 Cir. 2014) (quoting *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 784 (10th Cir.
17 2013)); *see also Mount v. Johnson*, 36 F. Supp. 3d 74, 80 (D.D.C. 2014) (noting that Title
18 VII exhaustion requirements are nonjurisdictional, and therefore, failure to exhaust must
19 be raised as an affirmative defense).

20 In addition to waiver, courts regularly create exceptions to non-jurisdictional
21 exhaustion requirements and other claim-processing requirements. *See, e.g., McBride*
22 *Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 976 (9th Cir. 2002) (holding that the

1 exhaustion requirement of 7 U.S.C. § 6912(e) is not jurisdictional and excusing the
 2 plaintiffs’ noncompliance); *Douglas v. Donovan*, 559 F.3d 549, 556 n.4 (D.C. Cir. 2009)
 3 (“Because the exhaustion requirement, though mandatory, is not jurisdictional . . . we do
 4 not decide whether Douglas adequately exhausted his administrative remedies.”); *Hoelt v.*
 5 *Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302-03 (9th Cir. 1992) (noting that the
 6 Individuals with Disabilities Education Act’s exhaustion requirement “is not a rigid one,
 7 and is subject to certain exceptions,” determined by “the general purposes of exhaustion
 8 and the congressional intent behind the administrative scheme”).

9 Because § 411(a)’s registration requirement is not jurisdictional, the court rejects
 10 Zillow’s arguments that the court “must” dismiss VHT’s claims and “cannot excuse” a
 11 failure to comply. Before turning to whether the court *should* dismiss VHT’s claims—
 12 and vacate the corresponding judgment—based on any defects in VHT’s compliance with
 13 the registration requirement under *Fourth Estate*, the court addresses VHT’s procedural
 14 objection to Zillow’s motion for judgment on the pleadings.

15 2. Procedural Propriety of Zillow’s Motion for Judgment on the Pleadings

16 VHT argues that Zillow’s motion for judgment on the pleadings is procedurally
 17 improper because “there no longer *are* operative pleadings.” (VHT Mot. at 19 (citing
 18 *Wash. State Auto Dealers Ins. Tr. v. Aon Consulting, Inc.*, No. C07-1182 MJP, 2008 WL
 19 4889680, at *1 (W.D. Wash. Nov. 12, 2008) (“Once the Court enters the final pretrial
 20 order, that document will supersede the parties’ pleadings and will control the remainder
 21 of this action.”))). Zillow responds that its motion is proper because although VHT’s
 22 pleadings have been superseded, those pleadings failed to show compliance with

1 § 411(a)'s registration requirement, and therefore entitle Zillow to judgment on those
2 pleadings—even if inoperative. (*See* Zillow Reply at 13-14.) Zillow further argues that
3 regardless of the form in which it brings its motion, Zillow is justified in raising the
4 *Fourth Estate* issue now, and courts “routinely recast motions for judgment on the
5 pleadings as motions for summary judgment.” (*See id.* at 13 (citing *Sirisup*, 2015 WL at
6 *4 (converting a motion for judgment on the pleadings into a motion for summary
7 judgment).)

8 VHT's argument is well-taken. The pretrial order in this case superseded the
9 pleadings (*see* PTO). Moreover, Rule 12(c) motions for judgment on the pleadings
10 should be made “[a]fter the pleadings are closed—but early enough not to delay trial.”
11 Fed. R. Civ. P. 12(c). Although the court agrees with VHT that a motion for judgment on
12 the pleadings is procedurally improper at this stage of the case, the court concludes that
13 Zillow is entitled to make its *Fourth Estate*-based arguments in another form. Zillow
14 could not have known about *Fourth Estate* at the time of trial because *Fourth Estate* was
15 decided after trial in this case. Zillow raised its *Fourth Estate*-based arguments in a
16 combined motion for judgment on the pleadings and motion for partial summary
17 judgment. (*See* Zillow Mot. at 5-12.) Moreover, Zillow suggests the court may construe
18 its motion for judgment on the pleadings as a motion for summary judgment (*see* Zillow
19 Reply at 13-14), and VHT does not respond to that suggestion in its reply brief (*see*
20 *generally* VHT Reply). Additionally, the court considers extraneous materials, including
21 VHT's copyright registrations, in order to resolve the issue. Therefore, the court

22 //

1 construes Zillow's motion as a motion for partial summary judgment on § 411(a)'s
2 registration requirement. *See Sirisup*, 2015 WL at *4.

3 3. Law of the Case

4 VHT contends that the law of the case doctrine precludes dismissal of its already
5 adjudicated claims based on the law of the case doctrine. (*See* VHT Mot. at 20-24.)

6 “Under the doctrine, a court is generally precluded from reconsidering an issue
7 previously decided by the same court, or a higher court in the identical case.” *United*
8 *States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014). “For the doctrine to apply,
9 the issue in question must have been decided explicitly or by *necessary implication* in the
10 previous disposition.” *Id.* However, “[t]he law of the case doctrine expresses the
11 practice of courts generally to refuse to reopen that which has been decided, and is not a
12 limitation of the courts’ power.” *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991).
13 The doctrine is discretionary, not mandatory. *See id.* (citing *United States v. Houser*, 804
14 F.2d 565, 567 (9th Cir. 1986)); *see also United States v. Mills*, 810 F.2d 907, 909 (9th
15 Cir. 1987); *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir.
16 1990). A court properly exercises its discretion to reconsider an issue previously decided
17 in only three instances: (1) the first decision was clearly erroneous and would result in
18 manifest injustice; (2) an intervening change in the law has occurred; or (3) the evidence
19 on remand was substantially different. *Milgard Tempering, Inc.*, 902 F.2d at 715.

20 Because *Fourth Estate* was decided after trial, and Zillow did not challenge
21 VHT's conformance with § 411(c)'s registration requirement, the court has not “decided
22 explicitly” whether VHT complied with § 411(a) when it instituted this lawsuit.

1 However, because § 411(a) is a pre-filing requirement, the fact that this case made it to
2 trial implies a decision that VHT either complied with § 411(a) or was excused from
3 compliance. *See Lummi Nation*, 763 F.3d at 1185. Accordingly, the court applies the
4 law of the case doctrine and concludes that VHT's compliance with—or excusal from
5 compliance with—§ 411(a) is the law of the case.

6 The court may still exercise its discretion to reconsider the judgment in this case
7 on VHT's copyright claims if *Fourth Estate* constitutes an “intervening change in law.”
8 *Milgard Tempering, Inc.*, 902 F.2d at 715. The court should only do so, however, “where
9 an intervening decision of a higher tribunal clearly demonstrates that the prior decision is
10 wrong.” *Pediatric Specialty Care, Inc. v. Arkansas Dep’t of Human Servs.*, 443 F.3d
11 1005, 1013 (8th Cir. 2006), *judgment vacated in part on other grounds sub nom. Selig v.*
12 *Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007). The court concludes that *Fourth*
13 *Estate* is not an intervening change in law with respect to VHT's copyright claims in this
14 case because *Fourth Estate* was decided after trial and judgment but before the appellate
15 opinion in this case, and the issue was not raised on appeal. *See Merritt*, 932 F.2d at
16 1320; *United States v. Scrivner*, 189 F.3d 825, 828 (9th Cir. 1999).

17 4. Excusal

18 Even if the law of the case doctrine did not apply here, and assuming Zillow did
19 not waive its objection to § 411(a)'s registration requirement, the court would excuse the
20 requirement in this narrow instance. *See, e.g., Paycom Payroll, LLC*, 758 F.3d at 1203
21 (10th Cir. 2014) (“Generally, a party may waive or forfeit the benefit of a
22 nonjurisdictional rule.”) (quoting *Muskrat*, 715 F.3d at 784; *Hoefl*, 967 F.2d at 1303.

1 Here, the purposes behind § 411(a)'s requirement would not be served by vacating
2 the final judgment and dismissing this case in its entirety. *See Hoeft*, 967 F.2d at 1303
3 (analyzing whether to apply exceptions to a statutory exhaustion requirement by
4 determining whether application of that requirement will "further the general purposes of
5 exhaustion and the congressional intent behind the administrative scheme"). Exhaustion
6 requirements serve twin purposes to (1) protect agency autonomy and (2) promote
7 judicial efficiency. *See Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975) ("Exhaustion is
8 generally required as a matter of preventing premature interference with agency
9 processes, so that the agency may function efficiently and so that it may have an
10 opportunity to correct its own errors, to afford the parties and the courts the benefit of its
11 experience and expertise, and to compile a record which is adequate for judicial
12 review."). Neither of these purposes would be served by dismissal here. First, VHT has
13 already obtained registrations for the images at issue, and dismissal would not require
14 VHT to interact with the Copyright Office whatsoever in order to refile its claims. (*See*
15 *supra* § II.B.) Second, dismissal would result in a massive waste of judicial resources.
16 The parties have litigated this case for five years through dispositive motions, trial,
17 post-trial motions, an appeal, and now a remand. (*See id.*)

18 At least one other court has already declined to dismiss copyright infringement
19 claims in cases that have advanced significantly, despite *Fourth Estate*'s intervention. In
20 *Schmidt v. Baldy*, No. CV169368DSFAGRX, 2019 WL 8219486, at *1 (C.D. Cal. June
21 11, 2019), the Central District of California declined to dismiss a defendant's copyright
22 infringement counterclaim after *Fourth Estate* was issued just weeks before trial. That

1 court noted that “the Supreme Court [in *Fourth Estate*] did not state that dismissal was
 2 the only remedy.” *Id.* Here, this case has progressed far beyond *Schmidt* relative to the
 3 time the defendant raised a *Fourth-Estate*-based objection.

4 True, several courts have granted motions to dismiss copyright infringement
 5 claims filed before *Fourth Estate* based on the failure to obtain copyright registrations.
 6 *See, e.g., Izmo, Inc. v. Roadster, Inc.*, No. 18-CV-06092-NC, 2019 WL 2359228, at *2
 7 (N.D. Cal. June 4, 2019); *UAB “Planner 5D” v. Facebook, Inc.*, No.
 8 19-CV-03132-WHO, 2019 WL 6219223, at *7 (N.D. Cal. Nov. 21, 2019); *Xclusive-Lee,*
 9 *Inc. v. Hadid*, No. 19-CV-520-PKCCLP, 2019 WL 3281013, at *4 (E.D.N.Y. July 18,
 10 2019); *Imagize LLC v. Ateknea Sols. Hungary KFT*, No. 18-CV-01098-RS, 2019 WL
 11 3068345, at *3 (N.D. Cal. July 12, 2019). However, none of these cases progressed as
 12 far as this one at the time of dismissal. Zillow fails to cite to any case in which a court
 13 dismissed copyright infringement claims based on *Fourth Estate* after a trial on the
 14 merits, a final judgment, an appeal, and a remand. The court declines to do so here.¹⁰

15
 16 ¹⁰ The parties also dispute whether amending a complaint “cures” a defect with § 411(a)’s
 17 registration requirement. (*See* VHT Mot. at 19; Zillow Reply at 14-18.) District courts are split
 18 on this question, although the majority of courts hold that amendment does not cure a defect.
 19 *See, e.g., Malibu Media, LLC v. Doe*, No. 18-CV-10956 (JMF), 2019 WL 1454317, at *2
 20 (S.D.N.Y. Apr. 2, 2019) (“Plaintiff’s argument would make a meaningless formality out
 21 of *Fourth Estate*’s requirement that an application be approved prior to filing suit. Were it
 22 correct, a plaintiff could file suit at any time, notwithstanding Section 411(a)’s precondition, and
 simply update the complaint when registration finally occurred.”); *cf. Imagize LLC v. Ateknea*
Sols. Hungary KFT, No. 18-CV-01098-RS, 2019 WL 3068345, at *3 (N.D. Cal. July 12, 2019)
 (dismissing complaint for failure to allege compliance with § 411(a)’s registration requirement
 with leave to amend). That this question is largely moot here is further reason to excuse strict
 compliance with § 411(a)’s requirement as interpreted by *Fourth Estate*. Here, VHT already
 amended its complaint to include allegations that it holds registrations for the images at issue,
 and that amended complaint was further superseded by the pretrial order. Therefore, the
 question of whether to allow amendment is not before the court. Moreover, the parties stipulated

1 **C. Compilation and Statutory Damages**

2 The parties cross-move for partial summary judgment on the issue of statutory
3 damages. (*See* Zillow Mot. at 15-21; VHT Mot. at 24-46.) Zillow contends that VHT’s
4 images constitute a “compilation” under 17 U.S.C. § 504(c)(1) and therefore a single
5 “work” for statutory damages purposes. (*See* Zillow Mot. at 15-21.) On that ground
6 Zillow contends that VHT is limited to one award of statutory damages for all remaining
7 images at issue. (*See id.*) VHT argues that the images do not comprise a “compilation”
8 and seeks judgment as a matter of law that VHT is entitled to a separate statutory
9 damages award for each remaining image. (*See* VHT Mot. at 24-46.)

10 The parties diverge in their interpretations of the Ninth Circuit’s opinion with
11 respect to the compilation question. Zillow focuses largely on the registration status of
12 VHT’s images and contends that the images’ independent economic value is “irrelevant”
13 to the compilation issue. (*See* Zillow Mot. at 15-23.) VHT, on the other hand, argues
14 that the images are separate works because they were separately infringed and contends
15 that separate statutory damages awards are appropriate even though it registered its
16 images as part of a “compilation” with the Copyright Office. (VHT Mot. at 38-46.)

17 The court proceeds with its analysis of the compilation issue as follows. First, the
18 court briefly reviews the relevant statutory text regarding compilations and statutory
19 damages. Second, the court reviews its prior analysis of the statutory damages question.

20
21 _____
22 in their proposed pretrial order—eventually entered by the court, superseding the pleadings—that
“[t]he United States Copyright Office has issued copyright registrations to VHT for 27,358 of the
photographs that are the subject of this action.” (*See* Prop. PTO at 5; PTO at 5.)

1 Third, the court analyzes the Ninth Circuit’s opinion in this case regarding the proper test
 2 for “compilation.” Fourth, the court reconciles the Ninth Circuit’s opinion here with
 3 earlier Ninth Circuit authority on which the court previously relied. Finally, based on the
 4 statutory text and the court’s reconciliation of these Ninth Circuit authorities, the court
 5 analyzes whether VHT’s images in this case constitute a “compilation.”

6 1. Statutory Damages Under the Copyright Act

7 Under the Copyright Act, a party may elect to receive statutory damages in lieu of
 8 actual damages for all infringements involved in the action “with respect to any one
 9 work.” *See* 17 U.S.C. § 504(c)(1). In relevant part, 17 U.S.C. § 504(c)(1) provides:

10 [T]he copyright owner may elect, at any time before final judgment is
 11 rendered, to recover, instead of actual damages and profits, an award of
 12 statutory damages for all infringements involved in the action, with respect
 13 to any one work, for which any one infringer is liable individually, or for
 14 which any two or more infringers are liable jointly and severally, in a sum of
 15 not less than \$750 or more than \$30,000 as the court considers just.

16 *Id.* Section 504(c)(1) further provides that “[f]or the purposes of this subsection, all the
 17 parts of a compilation or derivative work constitute one work.” *Id.*

18 A “work” is undefined in the statutory scheme. *See Sullivan v. Flora, Inc.*, 936
 19 F.3d 562, 567 (7th Cir. 2019). “Compilation” is defined as “a work formed by the
 20 collection and assembling of preexisting materials or of data that are selected,
 21 coordinated, or arranged in such a way that the resulting work as a whole constitutes an
 22 original work of authorship.” 17 U.S.C. § 101.

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1 2. The Court's Prior Analysis

2 Prior to trial, Zillow asked the court to determine whether 17 U.S.C. § 504(c)(1)
3 limits VHT to a single award of statutory damages for all infringements of any number of
4 images that VHT registered under an express claim of compilation in a single database.
5 (See Prop. PTO at 6.) VHT asked the court to determine whether it is entitled to separate
6 statutory damages awards for each image that has independent economic value. (See *id.*)

7 The court analyzed the statutory damages question on the record. (See 2/7/17
8 Trial Tr. at 11-17.) After a review of controlling Ninth Circuit authority, the court
9 determined that it must apply the “independent economic value” test to determine
10 whether VHT’s images constitute separate “works.” (See *id.*) Specifically, the court
11 relied on *Columbia Pictures I* and its progeny. (See *id.* (citing *Columbia Pictures I*, 106
12 F.3d at 295).) In *Columbia Pictures I*, the Ninth Circuit determined that the “proper test
13 to apply in analyzing whether [each material] is a separate work” for purposes of
14 statutory damages is whether each material “has an independent economic value.” See
15 *Columbia Pictures I* at 295. This court also noted that other circuits had rejected the
16 “independent economic value” test. (See 2/7/17 Trial Tr. at 16 (citing *Bryant v. Media*
17 *Right Prods., Inc.*, 603 F.3d 135, 142 (2d Cir. 2010)).) Further, other federal circuit
18 courts had recognized the Ninth Circuit’s application of the “independent economic
19 value” test. See, e.g., *Bryant*, 603 F.3d at 142 (noting that three other circuits have
20 adopted the “independent economic value” test, including the Ninth Circuit, and citing
21 *Columbia Pictures I*, 106 F.3d at 295).

22 //

1 The court also relied on *Columbia Pictures Television, Inc. v. Krypton*
2 *Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1193 (9th Cir. 2001) (“*Columbia*
3 *Pictures II*”). (See 2/7/17 Trial Tr. at 16-17.) *Columbia Pictures II* noted that every
4 circuit to address the issue of separate statutory damages has held that “separate
5 copyrights are not distinct works [for the purpose of statutory damages] unless they can
6 live their own copyright life,” and stating that “[a]s applied to episodes of a television
7 series, this test requires us to determine whether each episode has an independent
8 economic value and is, in itself, viable.” See *Columbia Pictures II*, 259 F.3d at 1193.
9 *Columbia Pictures II* states that the Ninth Circuit “adopted this test” for what constitutes
10 a “work.” *Id.*

11 Based on this authority, the court concluded that the independent economic value
12 test was the appropriate measure of whether VHT is entitled to separate statutory
13 damages for each of its images. (See 2/7/17 Trial Tr. at 17.) The court declined to “veer
14 from established and unqualified precedent based on an insignificant difference in
15 registration format and an equivocal Copyright Office interpretation that can be
16 reconciled with that precedent.” (See *id.*)

17 3. The Ninth Circuit’s Opinion

18 The Ninth Circuit opinion in this case reads *Columbia Pictures I* and its progeny
19 differently. Instead of a “test,” the Ninth Circuit reads *Columbia Pictures II* to hold that
20 the question of independent economic value “informs our analysis of whether the photo
21 or episode is a work, *though it is not a dispositive factor.*” See *VHT, Inc.*, 918 F.3d at
22 747 (citing *Columbia Pictures II*, 259 F.3d at 1193) (emphasis added). Moreover, the

1 Ninth Circuit declared that “consideration of the independent economic value factor does
 2 not answer the question whether something is a compilation” under 17 U.S.C. § 101.
 3 *VHT, Inc.*, 918 F.3d at 747. In other words, “independent economic value” is merely one
 4 factor in determining whether something is a separate “work,” and does not resolve
 5 whether something is a “compilation.”

6 The Ninth Circuit held that “[w]hether various VHT photo collections comprise
 7 one or more compilations is a threshold damages question.” *See id.* The Ninth Circuit
 8 further noted that “[t]hough the registration label is not controlling, it may be considered
 9 by the court when assessing whether a work is a compilation.” *Id.* at 748. The Ninth
 10 Circuit emphasized that “[u]ltimately, what counts is the statutory definition.” *Id.* The
 11 Ninth Circuit therefore remanded to this court “for further proceedings as to whether the
 12 VHT photos remaining at issue were a compilation.” *Id.*

13 4. Reconciliation with *Columbia Pictures I* and Its Progeny

14 Now, the court must reconcile the Ninth Circuit’s opinion with *Columbia Pictures*
 15 *I* and its progeny with respect to (1) the role of the “independent economic value” test;
 16 and (2) the interaction between “work” and “compilation.”

17 a. *Independent Economic Value*

18 First, the Ninth Circuit concludes that “the question of whether something . . . has
 19 ‘independent economic value’ . . . is not a dispositive factor” as to whether something is a
 20 “work” for the purpose of statutory damages. *See id.* at 747. The Ninth Circuit cites
 21 *Columbia Pictures II*, 259 F.3d at 1193, in support of this conclusion. *Columbia Pictures*
 22 *II* states that “every circuit to address the issue has held that ‘separate copyrights are not

1 distinct works unless they can ‘live their own copyright life,’” *Columbia Pictures II*, 259
2 F.3d at 1193 (quoting *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir.
3 1990)) (additional internal quotation omitted), and that as applied to episodes of a
4 television series, “this test requires us to determine whether each episode ‘has an
5 independent economic value and is, in itself, viable,’” *see id.* (emphasis added) (quoting
6 *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993) (internal
7 citation omitted). *Columbia Pictures II* goes on: “We adopted this test for what
8 constitutes a ‘work’ in a prior appeal of this case.” *Id.*

9 In addition to *Columbia Pictures II*, *Columbia Pictures I* holds that “the proper
10 test to apply in analyzing whether each episode is a separate work” is whether the
11 episodes have “independent economic value.” *See Columbia Pictures I*, 106 F.3d at 295.
12 Moreover, other circuits view the Ninth Circuit as having adopted the independent
13 economic value “test.” *See, e.g., Bryant*, 603 F.3d at 142 (noting that three other circuits
14 have adopted the “independent economic value” test, including the Ninth Circuit, and
15 citing *Columbia Pictures I*, 106 F.3d at 295).

16 Nevertheless, the Ninth Circuit now clarifies that “the question of whether
17 something . . . has ‘independent economic value’ . . . is not a dispositive factor” as to
18 whether something is a “work” for the purpose of statutory damages. *See VHT, Inc.*, 918
19 F.3d at 747. Thus, although the court will consider the “independent economic value” of
20 the VHT Photos, in fidelity to the Ninth Circuit’s opinion here, it will not consider this
21 factor as dispositive.

22 //

1 ***b. Relationship Between “Work” and “Compilation”***

2 Second, the Ninth Circuit concludes that “consideration of the independent
3 economic value factor does not answer the question whether something is a compilation.”
4 *See VHT, Inc.*, 918 F.3d at 747. Nevertheless, if *Columbia Pictures I* and *Columbia*
5 *Pictures II* are to be given effect, although independent economic value may not be
6 dispositive of the issue, it must at least weigh in favor of finding that that item is a
7 distinct “work.” If VHT’s images each are distinct “works” for statutory damages
8 purposes (possibly by virtue of having, in part, independent economic value), it would
9 appear that they cannot be a “compilation,” because a “compilation” is defined in the
10 statute as a single “work” for statutory damages purposes. *See* 17 U.S.C. § 504(c)(1).

11 Moreover, this court has been unable to locate a case that draws a bright-line
12 distinction between the question of whether something is a “compilation” and whether
13 something is a single “work” for the purpose of statutory damages. Courts generally treat
14 these as the same question in an analysis under 17 U.S.C. § 504(c)(1), and collapse them
15 into a single inquiry regarding whether materials are single or separate works for the
16 purposes of statutory damages. *See, e.g., Columbia Pictures I*, 106 F.3d at 292;
17 *Columbia Pictures II*, 259 F.3d at 1193; *Bryant*, 603 F.3d at 142 (comparing the Second
18 Circuit’s test for “compilation” directly with the Ninth Circuit’s “independent economic
19 value” test for “work”); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1180 (9th Cir.
20 2012) (holding that each wedding photo on a disk is a separate “work” and the set of
21 photos is not a “compilation” because each photo “has an independent economic value”)
22 (quoting *Columbia Pictures II*, 259 F.3d at 1193)). Thus, although this court is mindful

1 of the Ninth Circuit’s instruction that “the independent economic value factor does not
2 answer the question whether something is a compilation,” *see VHT, Inc.*, 918 F.3d at 747,
3 the court concludes that independent economic value is still one factor that is relevant to
4 its analysis.

5 *c. Reconciliation*

6 As this court is bound by the Ninth Circuit’s opinions in this case and in the
7 *Columbia Pictures* line of cases, the court must reconcile the two. First, the court takes
8 heed of the Ninth Circuit’s instruction that “[u]ltimately, what counts is the statutory
9 definition” of “compilation.” *VHT, Inc.*, 918 F.3d at 748. Thus, the court reads the Ninth
10 Circuit’s instruction and the statutory text to require the court to consider how VHT’s
11 images are “selected, coordinated, or arranged” in analyzing whether they constitute a
12 compilation.

13 For further guidance, the court turns to *Bryant*, 603 F.3d at 142.¹¹ In *Bryant*, the
14 Second Circuit analyzed whether the songs on an album each constituted separate works
15 or a single compilation. *See id.* at 140. The *Bryant* court focused on whether “the
16 plaintiff—the copyright holder—issued its works separately, or together as a unit.” *Id.* at
17 141. The court noted that in two prior cases, a series of television shows and a series of
18 songs were not “compilations” because the plaintiff issued each episode or show
19 separately. *Id.* (citing *Twin Peaks Prods., Inc. v. Publ’ns. Int’l Ltd.*, 996 F.2d 1366, 1381
20

21 ¹¹ The Ninth Circuit cited *Bryant* for the proposition that “[t]he question of whether a
22 work constitutes a ‘compilation’ for the purposes of statutory damages pursuant to Section
504(c)(1) of the Copyright Act is a mixed question of law and fact.” *See VHT, Inc.*, 918 F.3d at
747 (citing *Bryant*, 603 F.3d at 140).

1 (2d Cir. 1993); *WB Music Corp. v. RTV Comm. Grp., Inc.*, 445 F.3d 538, 541 (2d Cir.
2 2006)). The *Bryant* court then contrasted those facts from the facts before it, in which the
3 copyright holders decided to issue their songs in album form and concluded that the
4 albums constituted “compilations.” *See id.*

5 The court finds the *Bryant* court’s method of determining whether something is a
6 “compilation” persuasive. *Bryant*’s focus on how the copyright holder arranges its own
7 materials hews closely to the statutory language that addresses how the materials at issue
8 are “selected, coordinated, or arranged.” *See* 17 U.S.C. § 101. Moreover, looking to the
9 form in which the copyright holder issues its materials helps reconcile the Ninth Circuit’s
10 opinion in this case with the *Columbia Pictures* line of cases. Under this analysis, it may
11 be possible for materials to have independent economic value *if* issued separately (and
12 therefore potentially constitute separate “works”), but *in fact* not be issued separately
13 (and therefore constitute a compilation).

14 Applying *Bryant*’s analysis is not a perfect solution. Tensions remain between the
15 definition of “work” and the definition of “compilation.” Nevertheless, the court finds
16 the most faithful reading of the Ninth Circuit’s opinion here to be that *Columbia Pictures*
17 *I* and *Columbia Pictures II* are about “works,” not “compilations.” If that is the case,
18 even though *Bryant* distinguishes its test from that in *Columbia Pictures I* and *Columbia*
19 *Pictures II*, the *Bryant* test can be reconciled by interpreting it as defining a
20 “compilation,” separate and apart from “work.”

21 *Bryant*’s approach is also consistent with one potential reading of *Monge*. *See*
22 *Monge*, 688 at 1180. In *Monge*, the Ninth Circuit analyzed the question of “work” and

1 “compilation” together. *See id.* (concluding that each photo on a disk was a separate
2 work and concluding in the following sentence that “[i]n sum, there is no compilation.”).
3 However, the *Monge* court reviewed the statutory definition of compilation and
4 concluded that a series of images on a disk were not “selected, coordinated, or arranged”
5 to create “an original work of authorship.” *Id.*

6 Finally, the court pays heed to the Ninth Circuit’s instruction that “[t]hough the
7 registration label is not controlling, it may be considered by the court when assessing
8 whether a work is a compilation.” *VHT, Inc.*, 928 F.3d at 748. Therefore, the court will
9 consider VHT’s images’ registration label insofar as it provides guidance with respect to
10 how VHT’s images are “selected, coordinated, or arranged” when VHT issues those
11 images. *See* 17 U.S.C. § 101.

12 5. Application

13 Zillow argues that VHT’s images are a “compilation” because they are part of
14 VHT’s master photo database and because the Copyright Office determined that VHT’s
15 database is a compilation. (*See* Zillow Mot. at 15.) VHT responds that the question is
16 not whether it stores its photos in a database, but rather whether its photos “used on Digs”
17 are part of a compilation. (*See* VHT Mot. at 34 (citing *VHT, Inc.*, 918 F.3d at 747).) In
18 other words, VHT argues that the question is whether the “works infringed” make up a
19 compilation or not. (*See id.* at 34-35.)

20 The court agrees with VHT. VHT stores its images in a database and registers the
21 database as well as its individual images. However, VHT’s organization of its images
22 *prior to* issuance does not answer the question of how VHT’s images are organized or

1 arranged *when issued*. See *Bryant*, 603 F.3d at 142; see also *Monge*, 688 F.3d at 1180
2 (holding that individual wedding images on a disk did not constitute a “compilation”). In
3 fact, VHT licenses its images on a per-image or per-property basis. Thus, VHT’s images
4 in its database are more akin to the television episodes in *Twin Peaks* than the collection
5 of songs on an album in *Bryant*. Compare *Twin Peaks Prods., Inc.*, 996 F.2d at 1381,
6 with *Bryant*, 603 F.3d at 142. True, the fact that VHT group-registers its images as
7 “compilations” weighs in favor of a “compilation” finding. See *VHT, Inc.*, 928 F.3d at
8 748. However, this factor is not controlling (*see id.*), and the court finds it outweighed by
9 the form in which VHT issues its images.

10 Finally, to the extent the images’ independent economic value remains a factor to
11 consider in the “compilation” analysis, *see supra* § III.C.4.b, the court concludes, based
12 on the jury’s finding, that this factor weighs against finding a “compilation.”¹² (*See*
13 *Verdict Form* at 5.)

14 Therefore, the court concludes as a matter of law that VHT’s database does not
15 constitute a “compilation” under 17 U.S.C. § 101. Accordingly, the court DENIES
16 Zillow’s motion for partial summary judgment on the compilation issue, and GRANTS
17 VHT’s motion for partial summary judgment on the same issue.

18 //

19 //

20 //

21 ¹² The court notes, however, that even if it did not consider the independent economic
22 value factor, it would still conclude that VHT’s database does not constitute a compilation under
17 U.S.C. § 101.

D. Order Regarding Remaining Issues in This Case

Having concluded that the court will not dismiss this case on *Fourth Estate* grounds, and that VHT's database is not a "compilation" as a matter of law, the court ORDERS the parties to submit the following:

(1) A joint statement, not to exceed ten (10) pages, that includes (a) the parties' position(s) as to the remaining issues left for adjudication in this case; and (b) if the parties believe any issues remain that are not addressed by an amended judgment, the parties' proposal for resolving those remaining issues; and

(2) A proposed amended judgment that accounts for the Ninth Circuit's reversal of the court's denial of Zillow's motion notwithstanding the verdict on the issue of willfulness and vacating of the jury's willfulness determination (*see* 9th Cir. Op., 918 F.3d at 750).

The parties should confer and attempt to reach agreement on both of the above items. If the parties are unable to reach agreement, the parties may include separate statements. The parties shall file their statement and their proposed amended judgment no later than fourteen days from the date of this order.

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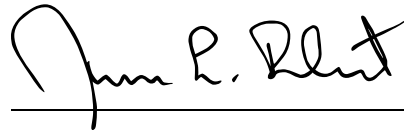
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IV. CONCLUSION

For the foregoing reasons, the court DENIES Zillow's motion for judgment on the pleadings or for partial summary judgment (Dkt. # 339); and GRANTS VHT's motion for partial summary judgment (Dkt. # 343). The court further ORDERS the parties to submit a joint statement and proposed amended judgment as specified in Section III.D of this order.

Dated this 8th day of May, 2020.

A handwritten signature in black ink, appearing to read "James L. Robart", is written over a horizontal line.

JAMES L. ROBART
United States District Judge